In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4362

JOHN EARL and JOHN JOHNSON,
Plaintiffs-in-Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Defendant in Error

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STATEMENT OF THE CASE

That on December 23, 1923, at Seattle, Washington, Government prohibition agents, armed with a Federal search warrant obtained upon an affidavit and application made by one of them, were watching certain premises, known as a basement,

beneath 2011 E. Terrace Avenue, which was a garage. After lying in wait from Ten o'clock in the morning until Two o'clock in the afternoon, defendants drove up and into said garage a certain Dodge Touring Car covered with mud and heavily loaded; the agents immediately entered the garage and found seventeen sacks of various brands of whiskey and gin in the automobile, and placed the defendants under arrest. No other liquor was found on the premises.

Before and during the trial of the case, defendants sought to have this evidence excluded, upon motion therefor, and the refusal of the court to grant said motion is here assigned as error, for the consideration of the court. Defendants also contend that the charges of possession and transportation constitute but one offense, and that the penalty imposed upon them for possession should be remitted.

ARGUMENT

The Government contends that the Court committed no error in its refusal to suppress the evidence, and further contends that in view of all the circumstances surrounding this case that no search warrant was, in fact, needed.

Counsel for the defendants seeks to interpret the effect of the affidavit and application for search warrant by portions. In determining whether agent O'Harra gave sufficient facts to establish the existence of probable cause, upon which to secure a warrant for the search of this basement, the affidavit must be considered as a whole.

It is conceded by the defendants that the garage was separate and apart from the house and was not used as part of the dwelling,—hence, no question of search of a private dwelling is here involved. The affidavit referred to showed that the basement was being used for the transaction of business; that packages were hauled from there to a hotel; that both the garage and hotel had been reported by other persons to be "bootlegging joints"; that the agents knew that the persons using the garage were then actively engaged in bootlegging.

If, under the testimony presented by the Government at the trial, this court should feel that a search warrant was necessary, it is earnestly contended that the agent produced enough facts before the Commissioner to establish the existence of probable cause upon which to believe that the

garage was being used for illicit traffic in intoxicating liquor, and justified the issuance of the search warrant.

In quoting on page 9, line 18, of counsel's brief, as follows:

"And all the above persons *engaged* in bootlegging business exclusively,"

it should have read:

"And all the above persons *engage* in bootlegging business exclusively." (Tr. p. 9, line 30.)

It is not necessary in an application for a search warrant to prove a case beyond a reasonable doubt, and the mere fact that all of the persons mentioned were not caught red handed, does not indicate that they were not using the premises. There is no proof that they were not, and the affidavits of defendants in their motion to suppress is not proof that other persons mentioned were not interested in and using said basement.

Counsel for the defendants further contends that the search warrant was a general warrant, and void for the reason that it did not sufficiently describe other buildings. The Government contends otherwise, and a glance at the map (Tr. p. 15) would seem to indicate that there could be no ques-

tion as to the buildings referred to. In this case the garage is specifically mentioned and accurately described, and were the only premises entered by the agents; if the other buildings had been searched, these defendants claiming no interest in them could not be harmed. This ruling of law has been decided so many times that it hardly needs citation.

McDaniel v. U. S. (6 C. C. A.), 294 Fed. 769;

Schwartz v. U. S. (5 C. C. A.), 294 Fed. 528.

The operations in this basement were particularly described in the affidavit for search warrant and no uncertainty existed as to the basement intended.

The Government contends that in this case no search warrant was necessary. The evidence of Gordon B. O'Harra, corroborated by John Pickett (Tr. 43, 44) was as follows:

"Pickett and I went out to this place some time between 10 and 10:30 o'clock in the forenoon and stationed ourselves in my automobile about two blocks each of the garage in the basement of 2011 East Terrace Drive. We stayed until about noon and then left for our lunch, then came back and remained until 2 o'clock watching this garage. About 2 o'clock the defendants, Johnson and Earl, came up to the place from the north in a Dodge Touring

car, which was covered with mud and heavily loaded; they pulled up to the garage and Earl got out and opened the door and they pulled in. Then as soon as they started into the garage we started our car and pulled into the alley behind them. They had the door of the garage locked. When I knocked they opened the door and I went in and served the search-warrant on defendant Earl, and placed both under arrest as soon as we saw the liquor in the car."

From the foregoing evidence and the information which agents had of the use being made of these premises and of the reputation of the persons using them, together with the experience of prohibition agents in handling such cases, it cannot be said that they were acting merely on suspicion, or without probable cause to believe that the defendants were then and there engaged in the commission of a crime, either a felony or a misdemeanor, or both, and in their presence.

The defendants could have been charged with a felony, namely with having conspired together to violate the National Prohibition Act, or as in this case, with the commission of a misdemeanor. They are fortunate in having been charged only with a misdemeanor. The prohibition agents were there watching for the appearance of the automobile, and as it passed them, covered with mud and heavily

loaded with articles other than people, they would have been derelict in their duty had they not made a search of the car and arrested the defendants.

The question of search of automobiles without a warrant has been fully covered in the case of *U. S. v. Rembert*, 284 Fed. 996, and on pages 1006 and 1007, paragraph 10, appears the following:

"Under the Volstead Act, an express provision for seizure upon discovery of illegal transportation is made, and the term 'discovery,' as used in this act, is to be construed in the light of the principles of American and English common law, defining when arrests can be made without warrant; that is, when an offense occurs in the presence of an officer, and a discovery may be said to have been made by the federal officers when the evidence of their senses induces them to believe, upon reasonable grounds for belief, that an offense is being committed, and it is not necessary, if a sincere belief exists, and this belief is based upon reasonable grounds, that the officer actually see, before apprehension is made, the liquor the subject of the apprehension.

"(6) Officers should be very loth to interfere with the rights of citizens, and should not arrest on mere suspicion, and wherever an arrest and consequent search of a person or vehicle is made without warrant, the government must be prepared to show, if it expects the evidence to be admissible, that the arrest and search was not a

mere exporatory enterprise for the purpose of discovery, but was based upon a sincere belief, with reasonable grounds therefor, that an offense had been committed by the person or vehicle arrested.

"In the case at bar the court is convinced that Officer Myers had a sincere and real belief that, from the way and manner in which the car was being driven, the driver was intoxicated, and that the car was being used to transport liquor contrary to law, and while the evidence of his senses on which that conclusion was based might at first blush appear to be meager, taken in the light of the experience of the officer in arresting and apprehending persons who had been handling the brand of liquor known as 'moonshine' the court does not feel justified in holding that the officer had not probable cause for the belief engendered by the facts brought home to his senses."

In *Lambert v. United States*, 282 Fed. 413 (9 C. C. A.) at page 417, this Court said:

"The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search and seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition

Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant."

In *Milam v. United States*, 296 Fed. 629 (4 C. C. A.) at page 631, we find the following discussion on the interpretations of the law in question in the light of present conditions:

"We are not inclined to extend the rule of exclusion of evidence obtained by unlawful search beyond the decisions of the Supreme Court. The constitutional expression, 'unreasonable searches,' is not fixed and absolute in meaning. The meaning in some degree must change with changing social, economic and legal conditions. The obligation to enforce the Eighteenth Amendment is no less solemn than that to give effect to the Fourth and Fifth Amendments. The courts are therefore under the duty of deciding what is an unreasonable search of motor cars, in the light of the mandate of the Constitution that intoxicating liquor shall not be manufactured, sold, or transported for beverage purposes. Every constitutional or statutory provision must be construed, with the purpose of giving effect, if possible, to every other constitutional and statutory provision, and in view of new conditions

and circumstances in the progress of the nation and the state. Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; South Carolina v. United States, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; Elrod v. Moss (C. C. A. 4th Circuit) 278 Fed. 123, 129; Agnello v. United States (C. C. A. 2nd Circuit) 290 Fed. 671.

"In view of the difficulties of enforcing the mandate of the Eighteenth Amendment and the statutes passed in pursuance of it, we cannot shut our eyes to the fact known to everybody that the traffic in intoxicating liquors is carried on chiefly by professional criminals in motor cars. Robberies and other crimes are committed, and criminals escape by their use. To hold that such motor cars must never be stopped or searched without a search warrant would be a long step by the Courts in aid of the traffic outlawed by the Constitution. The argument in favor of stopping and searching without warrant motor cars in the effort to detect robbery and other crimes and to discover stolen goods is also very strong, but with that we are not now concerned. Objections to such searches made by officers with due courtesy and judgment generally come, not from citizens interested in the conservance of the law, but from criminals who invoke the Constitution as a means of concealment of crime.

"(2) Property forfeited by reason of the crime with which it is connected is not entitled to legal protection. A person in possession of forfeited property has no right to the protection of his pos-

session, and such forefited property is always rightfully subject to seizure on behalf of the government. United States v. Stowell, 133 U. S. 19, 10 Sup. Ct. 244, 33 L. Ed. 555; Taylor v. United States, 3 How. 197, 205, 11 L. Ed. 559; Boyd v. United States (4th Circuit) 286 Fed. 930; United States v. Welsh (D. C.), 247 Fed. 239.

"Search and seizure of automobiles without search warrant is enforcement of the National Prohibition Act (Comp. St. Ann. Supp. 1923, Sec. 10138¼ et seq.) has been justified on this ground. United States v. Fenton (D. C.), 268 Fed. 221; United States v. Bateman (D. C.), 278 Fed. 231; United States v. Rembert (D. C.), 284 Fed. 996. We leave in abeyance the general question of the right of an officer to search an automobile whenever and wherever he sees fit, to the end that he may obtain evidence and ascertain whether the car and liquor contained in it had been forfeited."

In *United States v. Bateman*, 278 Fed. 231 at page 233, we find the following:

"In the act of Congress approved November 23, 1921, section 6 provides as follows:

" 'That any officer, agent, or employee of the United States engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously

and without reasonable cause search any other building or property, shall be guilty of a misdemeanor.'

"Again, if Congress deemed it an unreasonable search and seizure in a case like the one before the court, it had a good opportunity to express its convictions, but it did not. This would seem to be a sanction by Congress to search vehicles or other buildings or property without a warrant, unless the same was done maliciously and without reasonable cause.

"It is my opinion that there is no legislation of Congress upon the subject of searches and seizures of automobiles, except as above specified, and the Court must in each individual case determine, as a judicial question, whether or not the search and seizure of an automobile is an unreasonable search or seizure, in view of all the circumstances in the case.

"(4) Let us now proceed to consider as a judicial question in this case whether or not it was an unreasonable search or seizure for the officer to have proceeded as he did without a search warrant. The Eighteenth Amendment went into force in January, 1919, and the first section reads as follows:

" 'After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.'

"There is now and has been ever since this

amendment went into effect almost a continuous stream of automobiles from at or near the Mexican border to Los Angeles and other parts of the country. If these automobiles could not be stopped and searched without a search warrant, the country, of course, would be flooded with intoxicating liquors, unlawfully imported. It is contended that the officers have no right to stop a person carrying a suit case, or satchel, to search for intoxicating liquors, on the ground that that would be a violation of the Fourth and Fifth Amendments to the Constitution. If a suit case or satchel could not be searched and seized without a search warrant, a tin container, jug, or bottle could not be taken away without a search warrant from a man carrying it. If an automobile, a suit case, satchel, tin container, jug, or bottle could not be searched and seized without a search warrant, they could not be seized at all, as a search warrant, under the law, can only be obtained upon affidavit showing that such automobile or other container had intoxicating liquor in it. Such an affidavit cannot be made upon information and belief, but must be positively sworn to. Before a search warrant could be obtained, of course, the effect to be searched would be out of reach. Any person must necessarily reach this conclusion.

"Under those circumstances the Eighteenth Amendment would have been stillborn. * * * At the time Congress passed the last act above referred to, automobiles had been seized by the hundreds without a search warrant. Containers of alcohol had been seized by the thousands without a search

warrant. Therefore, if Congress had been of the opinion that it was contrary to the Fourth and Fifth Amendments of the Constitution for these things to be done, it is most astounding that Congress did not pass laws regulating such searches and seizures, instead of leaving it to the Courts to decide. I think the failure of Congress to act in this matter is a tacit approval of the many acts which had occurred prior to November 23, 1921, and that automobiles might be searched."

Within the past two weeks the Supreme Court of the United States has held that automobiles may be searched without a search warrant, although the case has not yet been reported and I have not the title of same at hand.

ANSWER TO ASSIGNMENT OF ERROR NO. 6

Counsel contends the charge of possession is included in the charge of transportation. The Government contends that inasmuch as it requires more testimony to prove transportation of liquor than it does to prove its mere possession, that they are distinct and separate offenses. *Massey v. U. S.*, 281 Fed. 293 (8 C. C. A.), involving a similar case, states, in paragraph 5:

"It is urged that the court erred in refusing to require the government to elect to prosecute upon

only one count contained in the information, because but one transaction was involved. There was evidence that the defendant transported intoxicating liquor in an automobile, and then carried it into a dwelling house, where he was in possession of it. The National Prohibition Act penalizes the illegal possession, as well as the illegal transportation, of such liquor. Transportation involves elements of carriage or removal from one place to another that are not involved in mere possession. Separate acts, though parts of a continuous transaction may be made separate crimes by the legislative power, as in the case of one who unlawfully breaks and enters a building with intent to steal, and thereupon does steal while in the building. Morgan v. Devine, 237 U. S. 632, 638, 640, 35 Sup. Ct. 712, 59 L. Ed. 1153; Ebeling v. Morgan, 237 U. S. 625, 630, 35 Sup. Ct. 710, 59 L. Ed. 1151; Morris v. United States, 229 Fed. 516, 521, 143 C. C. A. 584; Morgan v. Sylvester, 231 Fed. 886, 888, 146 C. C. A. 82; Burton v. United States, 202 U. S. 344, 377, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392. The two offenses here involved were distinct, because the evidence to support the charge of possession was not sufficient to support the charge of transportation, without proof of an additional fact. Gavieres v. United States, 220 U. S. 338, 342, 31 Sup. Ct. 421, 55 L. Ed. 489."

Singer v. U. S., 288 Fed. 695 (3 C. C. A.) par. 4;

U. S. v. Hampton, 294 Fed. 345;

Reynolds v. U. S. (6 C. C. A.), 280 Fed. 1.

From the foregoing it would appear that no error was committed in sentencing the defendants to pay a fine upon each count. It is submitted that the defendants in this case have had a fair and impartial trial, upon evidence legally secured, and that the judgment of the lower courts should be affirmed.

Respectfully submitted,

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